IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 141 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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COMMISSIONER OF INCOME TAX

Versus

SARANGPUR COTTON MFG. CO. LTD.

Appearance:

1. INCOME TAX REFERENCE No. 141 of 1989
MR MANISH R BHATT for Petitioner No. 1
NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 03/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this Reference at the instance of the Revenue, the following questions are referred for our opinion in respect of assessment year 1974-75:-

(i) "Whether, on the facts and in the circumstances of the case, the assessee is entitled to claim a weighted deduction under section 35B of the Income Tax Act, 1961 in respect of the aggregate commission payments of Rs.53,320/- made to M/s. Bharatkumar Atmaram & Company and the Chhamanlal Kasturchand and Company Pvt.Ltd?

(ii) Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is right in law in holding that the assessee is entitled to a deduction of Rs.26,84,235/incurred on machineries replaced, as revenue expenditure?

(iii) Whether the Appellate Tribunal is right in law and on facts in holding that the claim in respect of (i) medical benefits and (ii) group term insurance has to be excluded for the purpose of section 40A(5) of the Income-tax Act, 1961 ?

2. We have heard Mr MR Bhatt, learned Senior Standing Counsel for the applicant - revenue. Though served, none appears for the respondent - assessee.

3. As far as question No.1 is concerned, the controversy raised herein is concluded in favour of the revenue and against the assessee by the decision of the Apex Court in CIT vs. Stepwell Industries Ltd. (1997) 228 ITR 171. On similar facts, the Apex Court held that when a middleman approaches the assessee for purchase of its goods for and on behalf of the foreign buyer and the assessee agrees to sell his goods, the middleman obtains the commission. But when the middleman is based in India, this does not amount to obtaining information regarding "market outside India of such goods, services or facilities". This is nothing but payment of sales commission to a middleman for the purpose of effecting sales. Hence, such commission is not entitled to weighted deduction under section 35B of the Income-tax Act, 1961.

Following the aforesaid decision, our answer to question No.1 is in the negative i.e. in favour of the revenue and against the assessee.

4. Coming to question No.2, two Division Benches of this Court have already held in CIT vs. Baroda

Industrial Development Corporation Ltd. (1992) 198 ITR 716 and CIT vs. Satyadev Chemical Ltd. (1997) 226 ITR 95 that whether cost of substitution or replacement of old machineries with new one can be regarded as current repairs or not is always a question of fact and a question of degree. The nature of business of the assessee, the extent of replacement, the necessity for replacement and other relevant facts are required to be considered and the principles applicable for determining whether such expenditure could be regarded as capital or revenue expenditure will have to be applied.

Keeping the aforesaid principles in mind, we have perused the judgment of the Tribunal, particularly, the discussion in paragraphs 11 to 14 thereof and we find that as against the total claim made by the assessee for an amount of Rs.35,49,011/- as expenses for repair and replacement of machineries, and after referring to the findings given by the ITO and the Commissioner (Appeals), the Tribunal ultimately directed the Income-tax Officer to allow Rs.26,83,235/- as admissible revenue expenditure and at the same time directed the ITO to withdraw the depreciation and development rebate granted by the ITO on the amounts treated by him as capital expenditure.

Whether in the given facts and circumstances of the case, replacement of parts of machinery would amount to revenue expenditure or capital expenditure is primarily a question of fact and we are satisfied that the Tribunal in arriving at the finding in the instant case has correctly understood and applied the legal principles for determining the character of expenditure to find out whether it is revenue or capital, to the facts of the present case.

In view of the above, our answer to question No.2 is in the affirmative i.e. in favour of the assessee and against the revenue.

5. Coming to question No.3, our attention is invited to the decisions of this Court in Ambica Mills Ltd. vs. CIT (1998) 231 ITR 583 and also in CIT vs. Ambica Mills Ltd.(1999) 236 ITR 921. In the aforesaid decisions, this Court has explained the Scheme of the provisions of Section 40(c) and Section 40A(5) of the Act.

Following the principles laid down in the aforesaid decisions, our answer to question No.3 is in the affirmative i.e. in favour of the assessee and against the revenue.

6. The Reference accordingly stands disposed of with no order as to costs.

(M.S. Shah,J) (K.A. Puj,J)

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